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A limited liability partnership formed in the State of Delaware

James M. Wood (SBN 58679)
Jayne E. Fleming (SBN 209026)
Amy Lifson-Leu (SBN 260062)
Katie B. Annand (SBN 260343)
REED SMITH LLP
101 Second Street, Suite 1800
San Francisco, CA 94105-3659
Telephone: +1 415 543 8700
Facsimile: +1 415 391 8269

Attorneys for DORA BAIREs, individually, and
on behalf the estate of JUAN CARLOS
BAIREs; and Teofilo MIRANDA, an
individual.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DORA BAIREs, et al.,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, et al.,

Defendants.

No.: C 09-05171 CRB

**PLAINTIFFS DORA BAIREs AND
TEOFILO MIRANDA'S OPPOSITION TO
BRIAN MYRICK'S MOTION TO DISMISS,
OR IN THE ALTERNATIVE, FOR
SUMMARY JUDGMENT**

Complaint Filed: October 30, 2009

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Courtroom 8

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I. INTRODUCTION

Plaintiffs Dora Baires (“Baires”) and Teofilo Miranda (“Miranda”) bring this suit on the grounds that Miranda and Baires’ son, Juan Carlos Baires (“Juan Carlos”) received grossly inadequate medical care while in the custody of the Department of Homeland Security (“DHS”), and Immigration and Customs Enforcement (“ICE”), and while incarcerated in the Lerdo Detention Facility (“Lerdo”) in Kern County. Juan Carlos died as a result of the inadequate medical care. Plaintiffs allege that Defendant Brian Myrick (“Myrick”) was personally involved in violating Juan Carlos’ constitutional rights and that he knew or should have known that Juan Carlos’ did not receive adequate medical care. Myrick introduces evidence outside the pleadings in an attempt to show that he was not responsible for the failure to provide adequate medical care to Juan Carlos. Nevertheless, this evidence, which should not be considered at this stage in the first place, only confirms that Myrick was personally involved in Juan Carlos’ care, and creates genuine issues of material fact. Accordingly, Plaintiffs have alleged sufficient facts to bring a claim against Myrick, and Myrick’s Motion should be denied.

II. FACTUAL BACKGROUND

DHS and ICE detained Juan Carlos from September 18, 2008, to November 12, 2008. *See* Second Amended Complaint (“SAC”) at ¶¶ 78, 105. For part of this time Juan Carlos was held at Lerdo. Myrick was the Deportation Officer assigned to Juan Carlos. *See* SAC at ¶ 81. During his 54-day incarceration, federal and county officers, medical providers, and medical personnel acting as agents for the federal government, documented that Juan Carlos was HIV-positive and required HIV medications to guard against life-threatening infections and death. *See e.g.*, SAC at ¶¶ 79, 83, 84. Nevertheless, the defendants, including Myrick, consciously disregarded Juan Carlos’ need for medical care, treatment and HIV medications. *See e.g.*, SAC at ¶¶ 85, 97.

On October 20, 2008, Juan Carlos was transferred from Santa Rita jail, where he had initially been held, to Lerdo. *See* SAC at ¶ 81. Plaintiffs allege that Ms. Tam, Juan Carlos’ immigration lawyer, faxed copies of Juan Carlos’ immigration court documents to Myrick, which included documentation that Juan Carlos was HIV-positive. *See id.* Despite this, Juan Carlos did not receive HIV medication at Lerdo even though he informed Lerdo personnel that he was HIV-

1 positive and had been taking HIV medicine. *See* SAC at ¶ 83. On October 24, 2008, Ms. Tam sent
 2 another urgent fax to Myrick again notifying Myrick that Juan Carlos was HIV-positive and
 3 requesting that Myrick immediately obtain HIV medications for Juan Carlos. *See* SAC at ¶ 85. Ms.
 4 Tam's fax made it clear that Juan Carlos had not received his HIV medications for days, and that he
 5 needed immediate access to these medications. Ms. Tam also sent a letter from Juan Carlos' doctor
 6 emphasizing that Juan Carlos must receive continuous HIV care. *See id.* Myrick, however, failed
 7 to act until three days later. On October 27, 2008, he placed a call to medical personnel at Lerdo.
 8 *See id.* No action was taken in response to his call, and Juan Carlos continued to be denied the life-
 9 saving HIV care and medications he needed.

10 By late October, Juan Carlos had developed severe pain in his left foot. *See* SAC at ¶ 86.
 11 When his mother, Plaintiff Dora Baires, visited Juan Carlos on November 1, 2008, she observed
 12 that he was in significant pain and was dragging his left foot behind him. *See* SAC at ¶ 89. His face
 13 was red from the discomfort. *See id.* Juan Carlos also began suffering debilitating migraines, likely
 14 as a result of the fact that he continued to be denied any type of HIV care or medication. *See* SAC
 15 at ¶ 86.

16 Over the next few weeks, Ms. Tam continued to contact Myrick to notify him that Juan
 17 Carlos was not receiving HIV medication. *See* SAC at ¶ 97. Again, Juan Carlos' medical charts
 18 show no indication that Myrick contacted Lerdo personnel in response to Ms. Tam's
 19 communications. *See id.* Juan Carlos continued to experience severe pain in his left foot, which
 20 became extremely swollen. *See* SAC at ¶¶ 90, 91, 93, 94, 96. On November 11, 2008, Juan Carlos
 21 had severe left foot pain and could not move his foot. *See* SAC at ¶ 101. He began experiencing
 22 chest pains, and was transported to the emergency room at Kern County Medical Center, where he
 23 suffered cardiorespiratory arrest and died. *See* SAC at ¶¶ 102, 104, 105.

24 Plaintiff Teofilo Miranda was incarcerated by Immigration and Customs Enforcement from
 25 September 18, 2008 to December 4, 2008. *See* SAC at ¶¶ 109, 133, 134. On several occasions,
 26 federal and county medical providers, and medical personnel acting as agents for the federal
 27 government, documented that Miranda was HIV positive and required medications to guard against
 28 life-threatening infections or even death. *See e.g.*, SAC at ¶ 112, 113, 114, 115, 118, 121, 122, 124,

1 130, 133. Nevertheless, Miranda did not receive the medical care, treatment and medications
2 required for his chronic condition. *See e.g.*, SAC at ¶¶ 114, 115, 118, 121, 122, 124, 130.

3 As a Deportation Officer responsible for detainees at Lerdo, Myrick knew or should have
4 known of the pattern of medical neglect endemic at Lerdo. Myrick fielded complaints from
5 detainees, including complaints and grievances concerning inadequate medical care. Nevertheless,
6 Myrick ignored the pleas from Juan Carlos' attorney regarding Juan Carlos' medical condition
7 despite his knowledge of Lerdo's poor track record.

8 Plaintiffs filed their original complaint on October 30, 2009. Plaintiffs amended their
9 complaint on May 4, 2010. The federal defendants filed motions to dismiss, and the Court granted
10 the motions without prejudice. On November 5, 2010, Plaintiffs filed the SAC.

11 **III. LEGAL ANALYSIS**

12 **A. Standard of Review**

13 Motions to dismiss for failure to state a claim are generally viewed with disfavor as the
14 "primary objective of the legal system is to obtain determination on merits, rather than dismissal
15 based on pleadings." *Cabo Distributing Co., Inc. v. Brady*, 821 F. Supp. 601, 608 (N.D. Cal. 1992).
16 To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true,
17 to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S.
18 544, 570 (2007). A claim has facial plausibility when the allegations in the complaint contain
19 "enough fact to raise a reasonable expectation that discovery will reveal evidence of" the violations
20 alleged. *Id.* at 556. The court must construe the pleading in the light most favorable to plaintiff and
21 resolve all doubts in plaintiffs' favor. *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480,
22 1484 (9th Cir. 1995) ("*Symington*"). Here, the Court should deny Myrick's Motion to Dismiss
23 because the SAC contains specific facts that are sufficient to state a claim for relief against Myrick
24 that is plausible on its face.

25 Moreover, unless the court converts a motion to dismiss into one for summary judgment, or
26 the defense is apparent from matters of which a court may take judicial notice, the court cannot
27 consider material outside the complaint, including facts presented in affidavits. *See Arpin v. Santa*
28 *Clara Valley Transp. Agency*, 261 F. 3d 912, 925 (9th Cir. 2001). Here, Myrick attempts to rely on

facts contained in an affidavit submitted with his Motion. The Court should refuse to consider the outside evidence because at this early stage in the case, the parties have not engaged in discovery beyond initial disclosures. Furthermore, the federal defendants failed to include any documents in their initial disclosure, in plain violation of Rule 26. As a result, Plaintiffs have been deprived of the opportunity to investigate the facts raised in Myrick's declaration. Plaintiffs, for example, are entitled to seek discovery on the extent of Myrick's knowledge about Juan Carlos' medical condition; his review of Juan Carlos' immigration and medical files; guidelines, policies and protocols governing his obligations to respond to complaints about inadequate medical care or medical emergencies; his communications with Lerdo medical personnel about Juan Carlos, including the number and timing of communications; his knowledge regarding deficient medical care at Lerdo, and his knowledge of Plaintiff Miranda.

If evidence outside the pleadings is considered by the court at the motion to dismiss stage, the motion must be treated as one for summary judgment, and the standard changes from determining whether a claim for relief has been stated to determining whether "there is a genuine issue as to any material fact . . . and the movant is entitled to judgment as a matter of law." FRCP 56(c)(2). Myrick has not and cannot show at this point in the litigation that there are no genuine issues as to any material fact and that he is entitled to judgment as a matter of law. First, Myrick's motion, despite being titled as "in the Alternative for Summary Judgment," does not even attempt to make a showing that there are no genuine issues of material fact. Instead, the motion recites the standard for a Rule 12(b)(6) motion to dismiss for failure to state a claim.

Second, the evidence raised by Myrick in the affidavit only confirms that several genuine issues of material fact exist at this stage. Did Myrick ignore the contents of the October 24, 2008, letter he received from Ms. Tam, further exacerbating Juan Carlos' dangerous medical state, as Plaintiffs allege, or did Myrick act reasonably, as he contends? Was the information conveyed by RN Deann to Myrick on October 27, 2008, regarding Juan Carlos' condition, sufficient to show that Baires was not denied access to medical care and would be seen in an appropriate manner, as Myrick contends? Or, does the allegation that his condition had deteriorated dramatically and that by November 1, 2008, he was visibly dragging his foot behind him when he walked and the foot

1 looked swollen and infected, call into question Myrick’s statement that he believed Juan Carlos was
 2 receiving adequate care? Plaintiffs allege that Ms. Tam also placed a call to Myrick days before
 3 Juan Carlos’ death, and that Juan Carlos’ medical records show no communications from Myrick to
 4 the Lerdo medical staff, and Myrick’s Declaration does not suggest there was one, making it
 5 probable that he ignored Ms. Tam’s urgent call. Therefore, even if the Court does decide to apply
 6 the summary judgment standard here, Myrick’s motion should be dismissed because he has failed to
 7 show that no genuine issues of material fact exist.

8 Finally, if the Court decides to treat this Motion as one for summary judgment, Plaintiffs
 9 request a “reasonable opportunity to present all the material that is pertinent” under the summary
 10 judgment motion.” FRCP 12(d); *see also In re Rothery*, 143 F.3d 546, 549 (9th Cir. 1998). This, of
 11 course, must include a reasonable opportunity to obtain documents from the federal defendants and
 12 a reasonable opportunity to conduct discovery.

13 **B. Plaintiffs Have Alleged Facts Sufficient to State a *Bivens* Claim Against Myrick.**

14 Myrick argues that that the SAC “fails to satisfy the threshold personal involvement
 15 requirement.” Motion at 5: 6-7. A plaintiff need not show direct, personal participation in an
 16 alleged constitutional violation to establish liability. *Wong v. United States*, 373 F. 3d 952, 966 (9th
 17 Cir. 2004). Instead, the requisite causal connection can be established by the defendant “setting in
 18 motion a series of acts by others, which the actor knows or reasonably should know would cause
 19 others to inflict the constitutional injury.” *Id.* The critical question is whether it was reasonably
 20 foreseeable that the defendant’s actions would lead to the alleged constitutional violation. *Id.*

21 Here, Plaintiffs have pled sufficient and specific facts detailing Myrick’s own actions with
 22 regard to Juan Carlos and that Myrick knew or should have known that Juan Carlos was not
 23 receiving adequate medical care.¹ Plaintiffs allege that Myrick was a Deportation Officer
 24 responsible for detainees at Lerdo. *See* SAC at ¶ 81. Plaintiffs further allege that Juan Carlos’
 25 attorney urgently communicated with Myrick on multiple occasions regarding Juan Carlos’ medical

26
 27 ¹ If the Court finds that Plaintiffs did not bring *Bivens* claims against Myrick, Plaintiffs request leave to amend
 28 their complaint.

condition and the importance of his receiving HIV medications. *See e.g.*, SAC at ¶¶ 81, 85, 97. One such communication included a letter from the Chief Physician of the HIV Division at Highland Hospital stressing that any interruption in Juan Carlos' HIV medications would be extremely dangerous to his health. SAC at ¶ 85. Plaintiffs allege, however, that Myrick failed to take any action, and as a result, Juan Carlos was denied the medical care he urgently needed, and ultimately died.

Based on these allegations, it is reasonable for this Court to infer that Myrick, due to both his position as a Deportation Officer and his personal involvement and responsibility for Juan Carlos, knew or should have known that Juan Carlos was not receiving adequate medical care. *See Ashcroft v. Iqbal*, ___U.S. ___, 129 S. Ct. 1937, 1949 (2009) (“[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”) Plaintiffs have pled sufficient facts to allow the court to make this inference here.

Myrick further argues that he was not responsible for “placing Baires at Lerdo, was not responsible for providing medical care to Baires, was not responsible for obtaining Baires’ medical records and was not responsible for ensuring that Kern County officials at Lerdo lived up to all the promises it [sic] made to the United States government in its contract to house detainees.” Motion at 5:20-24. Yet these arguments do not refute the allegations that Myrick was personally aware of the unconstitutional denial of medical care to Juan Carlos and that he failed to act. Furthermore, whether or not Myrick was responsible for ensuring Juan Carlos’ care is a question of fact, not a question of law. Myrick was the ICE officer assigned to Juan Carlos, thus his declaration that he was not responsible for Baires’ well-being raises a question of fact that cannot be resolved at this stage of the pleadings. Accordingly, Plaintiffs’ have alleged sufficient facts regarding Myrick’s personal involvement, and the Motion to Dismiss should be denied.

C. Plaintiffs Have State a Claim for Deliberate Indifference.

Not only have Plaintiffs alleged that Myrick was personally involved in the conduct alleged in the complaint, but they have also stated a claim for deliberate indifference. As a preliminary matter, Plaintiffs note that deliberate indifference is not the correct standard where Juan Carlos and

1 Miranda, as here, were civil rather than criminal detainees. *See Jones v. Blanas*, 393 F.3d 918, 934
 2 (9th Cir. 2004) (holding that civil detainees are entitled to “more considerate” treatment than
 3 criminal detainees, and therefore, “to prevail on a Fourteenth Amendment claim regarding
 4 conditions of confinement, the confined individual need not prove ‘deliberate indifference’ on the
 5 part of government officials”).

6 The Supreme Court has held that the government has an affirmative duty to provide medical
 7 care to those whom it incarcerates. “[H]aving stripped [inmates] of virtually every means of self-
 8 protection and foreclosed their access to outside aid, the government and its officials are not free to
 9 let the state of nature take its course.” *Farmer v. Brennan*, 511 U.S. 825, 833 (1970). The
 10 deliberate denial of medical care to prisoners therefore can constitute torture—a plain violation of
 11 the 8th Amendment. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (The Eighth Amendment requires
 12 the government “to provide medical care for those whom it is punishing by incarceration” because
 13 failure to do so “may actually produce physical torture or a lingering death.”) (internal citations
 14 omitted).

15 Nevertheless, Plaintiffs have also adequately pled their claims under the deliberate
 16 indifference standard:

17 The deliberate indifference standard embodies both an objective and a subjective
 18 prong. Objectively, the alleged deprivation must be “sufficiently serious,” in the
 19 sense that “a condition of urgency, one that may produce death, degeneration, or
 20 extreme pain” exists.... Subjectively, the charged official must act with a sufficiently
 culpable state of mind.

21 *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996) (internal citations omitted).
 22 “Officials may not . . . consciously disregard or act with deliberate indifference toward a
 23 detainee’s safety by knowingly placing that person in harm’s way.” *Papa v. United States*,
 24 281 F.3d 1004, 1010 (9th Cir. 2002). A detainee is not required to prove that he was
 25 completely denied medical care in order to state a claim of deliberate indifference. *See*
 26 *Lopez v. Smith*, 203 F.3d 1122, 1132 (9th Cir. 2000) (en banc). Rather, where, as here,
 27 officials have interfered with needed medical treatment they violate the Constitution. *See*
 28 *id.*; *see also Wakefield v. Thompson*, 177 F.3d 1160, 1165 (9th Cir. 1999) (prison officials’

1 alleged failure to provide prescribed medications supported a claim of deliberate
 2 indifference to inmate's serious medical needs). Thus, in order to properly plead a claim for
 3 deliberate indifference, Plaintiffs must allege that Juan Carlos had objectively serious
 4 medical needs that were not met, and that Myrick consciously disregarded those needs.

5 Plaintiffs have stated a claim for deliberate indifference. The SAC lays out the "serious
 6 medical needs" of Juan Carlos in detail. SAC ¶¶ 2-4, 76-77. "A serious medical need is 'one that
 7 has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay
 8 person would easily recognize the necessity for a doctor's attention.'" *Harrison v. Ash*, 539 F.3d
 9 510, 518 (6th Cir. 2008). Juan Carlos was HIV-positive, and required life-sustaining medications to
 10 ensure his continued health, well-being, and survival. *Id.* Any layperson knows that an HIV-
 11 positive detainee would require ongoing medical care and specialized medications. Undoubtedly,
 12 Juan Carlos' status as HIV-positive is enough to constitute a "sufficiently serious" medical
 13 condition.

14 As discussed in Section B *supra*, Myrick was aware of Juan Carlos' serious medical needs,
 15 and yet disregarded these needs on a continuous basis. The SAC contains allegations that Myrick
 16 was aware of Juan Carlos' medical condition and his urgent need for HIV medications, and that
 17 Myrick was aware of the risk of serious injury or death if Juan Carlos did not receive HIV
 18 medication. Despite being aware of the risks to Juan Carlos' safety and well-being, Myrick
 19 consciously disregarded Juan Carlos' serious medical needs.

20 Furthermore, it unconstitutional for governmental officials to place prisoners (or even
 21 private citizens) in harm's way. *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir.
 22 1997) ("[W]hen a state officer's conduct places a person in peril in deliberate indifference to their
 23 safety, that conduct creates a constitutional claim."). Here, Plaintiffs allege that Myrick deliberately
 24 denied medical care for both Juan Carlos, thereby subjecting them to the risk of serious illness and
 25 death. This in itself is sufficient to state a claim for violation of Juan Carlos' and Miranda's
 26 constitutional rights. *See L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), *cert. denied*, 508 U.S. 951,
 27 113 S.Ct. 2442, 124 L.Ed.2d 660 (1993) (concluding a valid section 1983 claim existed against a
 28 supervisor at a state facility who placed plaintiff in danger by assigning her to work with an inmate

1 sex offender who had a history of violent assaults against women; he subsequently raped and
 2 kidnapped her); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir.1989), *cert. denied*, 498 U.S. 938, 111
 3 S.Ct. 341, 112 L.Ed.2d 305 (1990) (concluding that a valid section 1983 claim existed against a
 4 state police officer who caused a woman to be stranded in a high-crime area at night where she was
 5 subsequently raped).

6 Accordingly, Plaintiffs have stated a claim for deliberate indifference.

7 IV. CONCLUSION

8 Based on the foregoing, Plaintiffs respectfully request that this court deny Defendant Brian
 9 Myrick's Motion to Dismiss, or In the Alternative, For Summary Judgment, in its entirety. If the
 10 Court grants Myrick's Motion to Dismiss, Plaintiffs respectfully request that the Court grant leave
 11 to amend.

12 DATED: February 18, 2011.

14 REED SMITH LLP

16 By /s/ Jayne E. Fleming
 17 Jayne E. Fleming
 18 Attorneys for Plaintiffs
 19 Dora Baires, individually, and on behalf of the
 20 estate of Juan Carlos Baires; and Teofilo Miranda
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